IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1077

ALBERT I. CASSELL, *Petitioner*,

vs.

HOWARD UNIVERSITY, A CORPORATION, *Respondent*.

PETITION OF ALBERT I. CASSELL FOR A REHEARING.

CHARLES S. BAKER,
CARROLL L. BEEDY,
WARREN E. MAGEE,
BENJAMIN L. TEPPER,
Attorneys for Petitioner.

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PETITION FOR REHEARING.

Comes now the above-named petitioner, Albert I. Cassell, and respectfully presents this, his petition, for a rehearing of the above-entitled cause. This case involves a contract of employment, *with evidence of work under that very contract after a date which would take the case out of the statute of limitations.* From that evidence, which was undisputed and conceded by respondent, the jury by its verdict found in favor of petitioner and awarded $19,687.50 to petitioner as compensation for more than three and a half years' "extension" services rendered to respondent. The court below re-examined that evidence and reached a different conclusion, after picking and choosing from *disputed* items of evidence, reversed the jury's verdict *on the*

theory petitioner finished his work more than three years before suit and *remanded with instructions to dismiss,* even though respondent under Rule 50(b) of the Federal Rules of Civil Procedure *only moved after verdict for a new trial.* Such action by the Court of Appeals deprived petitioner of a jury trial, was unfair, was based upon an improper record and exceeded that court's power.

BRIEF STATEMENT OF GROUNDS.

I.

The right to have disputed issues of fact in actions at law decided by a jury in the protection of life, liberty *and property* is one of the very cornerstones upon which our republic is founded. Since the Magna Charta it has served as a shield to protect the common man, as well as the privileged. So sacred to our forefathers was the jury trial that they wrote it into our "Bill of Rights."[1] Our "Bill of Rights" preserves for "the right of trial by a jury" and forbids appellate courts from re-examining facts tried by a jury other than according to the rules of the common law.

The nation, with other liberty-loving nations, is now engaged in a life and death struggle to preserve our way of life. Our treasure and our blood are being poured out to defend that way of life. That way includes the right of trial by jury, which, with the right of franchise and freedom of speech and religion, would be the very first privileges our enemies without and within would destroy. Encroachments upon any of these rights are injurious to the public interest and should not be tolerated.

In the instant case a colored man's right to a jury trial involving *over three and a half years of work* has been swept away by the *picking and choosing* of an appellate court of items of conflicting evidence. The jury's *conclusive*

[1] Amendment VII to the Constitution.

determination of the facts was not even paid "lip service" by that court.

Similar departures from established judicial procedure have called forth the exercise *in the public interest* of this Court's power of supervision in the cases of *Federal Trade Commission* v. *Algoma Co.*, 291 U. S. 67, 73; *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 270, 271; *National Labor Relations Board* v. *Link-Belt Company*, 311 U. S. 584, 597-599.

As the cases cited and this case involve the same basic question, *one concededly of the greatest public interest* and reaching to the very roots of our constitutional judicial system, it is difficult to comprehend why certiorari was denied here, yet granted in the cited cases.

II.

Further, this Court consistently has granted certiorari *in the public interest* to settle the question whether an appellate court can remand a case, tried by jury, *with instructions to dismiss the case*, when the defendant failed to comply with Rule 50(b) of the Federal Rules of Civil Procedure, and failed to file within ten days *after* verdict a motion for judgment n. o. v.[2] That precise question has *not* been and should be settled by this Court. *It is involved in this case.* Again we ask why, if the public interest warranted certiorari in the *Conway, Berry* and *Halliday* cases, that same interest would not warrant certiorari here?

Moreover, petitioner's declaration concededly stated a cause of action, *i.e.*, a contract of employment and work thereunder after June 4, 1933 (the crucial date on the

[2] *Conway* v. *O'Brien*, 312 U. S. 492, 493; *Berry* v. *United States*, 312 U. S. 450, 452; *Halliday* v. *United States*, — U. S. —, 86 L. Ed. 394, 395.

question of the statute of limitations). Evidence supported those allegations *concededly* (respondent's brief in opposition, pp. 16, 17) of work by petitioner *after June 4, 1933,* yet not only did the court below *reverse after picking and choosing items of evidence,* but forever deprived petitioner of his constitutional right of trial by jury, by remanding *not* for a new trial in accordance with the *only* motion filed by respondent *after* verdict, but with *instructions to dismiss the complaint.* A more dangerous and subtle method of depriving the citizen of his constitutional heritage is difficult to conceive. Such a practice was condemned by this Court in *Slocum* v. *New York L. Ins. Co.*, 228 U. S. 364.

Furthermore, there is a conflict between the decision below and *Pruitt* v. *Hardware Dealers Mut. Fire Ins. Co.*, 112 F. (2d) 140, which should also be settled by this Court in the public interest.[3]

We submit the proper practice under Rule 50(b) is of great public importance (which respondent concedes, brief in opposition, pp. 24, 25) both to courts and litigants throughout the entire United States and this Court ought to prescribe the proper practice thereunder as promptly as possible, as numerous cases are being tried daily under the rule.

Respondent's brief in opposition (pp. 26-29) cites *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243, and argues it is authority for the proposition that an appellate court can remand with instructions to dismiss when *no* motion judgment n. o. v. is filed within ten days after verdict. The *Duncan* case did not so hold, because the question was not involved in that case, as the defendant there *filed the motion for judgment n. o. v. within ten days after*

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[3] That conflict was pointed out by this Court in *Berry* v. *United States,* 312 U. S. 450, 452.

verdict as required by Rule 50(b). Thus the point was "reserved", making applicable the principle in *Baltimore & C. Line* v. *Redman,* 295 U. S. 654. But here respondent did not file *any* motion for judgment n. o. v., no "reservation" occurred and, hence, this case comes within the purview of *Slocum* v. *New York L. Ins. Co.,* 228 U. S. 364, which forbids a dismissal under such circumstances *as a violation of the Seventh Amendment.*

This Court has recognized that the *Duncan* case did not interpret the proper practice pertaining to motions for judgment *n. o. v.* under Rule 50(b), and *granted certiorari to review the interpretation of that phase of Rule 50(b)* announced in the *Berry, Conway* and *Halliday* cases, which cases this Court reversed *on the merits, without* interpreting the rule.

Respondent argues the *Duncan* case holds that a denial of a motion for a *directed* verdict *amounts* to an automatic denial of a motion for judgment n. o. v. (even though *no* motion for judgment n. o. v. was ever filed). The *Duncan* case holds just the opposite. In that case this Court said action by a trial court in granting a motion for judgment is not an *automatic* denial even of an *alternative* motion for a new trial. *A fortiori* there could be no automatic denial of a motion *never filed.*

III.

Respondent's proven conduct after January, 1933 (Petition for a Writ of Certiorari, pp. 13-15, 21) raised at the very least the *factual* issue of whether petitioner was *lulled* and *induced* into delaying suit. As the trial court ruled no issue was presented under the evidence concerning the statute of limitations (because it was *undisputed* and *conceded* that petitioner worked on extension *after June 4, 1933*), the estoppel issue did not go to the jury. On ap-

peal the case was reversed on the *sole* question of the statute, with the appellate court *holding* petitioner was not induced into delaying suit by respondent's conduct. We submit that the effect of that action of the appellate court was to deprive petitioner of his day in court.

Thus, even were the suit late, the evidence still presented a factual issue for the jury as to whether respondent *induced* that delay. It is unfair to hold *on appeal* that the suit is late and then dismiss *without* submitting the estoppel issue to the jury. Such a practice has been strongly condemned by this Court as a denial of due process of law and involving appellate decisions based upon *improper records. Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267; *Saunders* v. *Shaw*, 244 U. S. 317; *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 268; *U. S.* v. *Rio Grande Dam & Irrigation Co.*, 184 U. S. 416, 423, 424; *Willing* v. *Binenstock*, 302 U. S. 272, 277.

The Circuit Courts of Appeal repeatedly have recognized this rule so clearly enunciated by this Court.[4]

The conflict between the practice enunciated by the court below and the applicable decisions of this Court and of other Circuit Courts of Appeal should be resolved in the public interest to assure fair and orderly procedure.

If certiorari is granted by this Court petitioner will make every effort to eliminate from the large record[5] here involved irrelevant and immaterial matters.

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[4] *Fifth Third National Bank* v. *Johnson*, 219 F. 89, 95; *Columbus Gas & Fuel Co.* v. *City of Columbus*, 55 F. (2d) 56, 57; *Faulks* v. *Schrider*, 99 F. (2d) 370, 373; *Hughes* v. *Reed*, 46 F. (2d) 435, 442, 443; *Wilson* v. *Spencer*, 261 F. 357, 358; *Underwood* v. *Comn. of Internal Revenue*, 56 F. (2d) 67, 72, 73; *Finefrock* v. *Kenova Mine Car Co.*, 22 F. (2d) 627, 634; *Hamilton Gas Co.* v. *Watters*, 75 F. (2d) 176, 182.

[5] The size of the record on appeal is no fault of the petitioner. No effort was made by respondent to reduce this entire record to narrative form, even though petitioner consented to an extension for the full period of time allowable for that purpose in the District Court.

CONCLUSION.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, the order of this Court entered herein on April 27, 1942, be vacated, a writ of certiorari be granted and the judgment of the United States Court of Appeals for the District of Columbia, upon further consideration, be reversed.

Respectfully submitted,

CHARLES S. BAKER,
CARROLL L. BEEDY,
WARREN E. MAGEE,
BENJAMIN L. TEPPER,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

We, Charles S. Baker, Carroll L. Beedy, Warren E. Magee, and Benjamin L. Tepper, counsel for the above-named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

CHARLES S. BAKER,
CARROLL L. BEEDY,
WARREN E. MAGEE,
BENJAMIN L. TEPPER,
Attorneys for Petitioner.

May 19, 1942.